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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 459

C. MAXWELL BROWN, - - - - Petitioner,

vs.

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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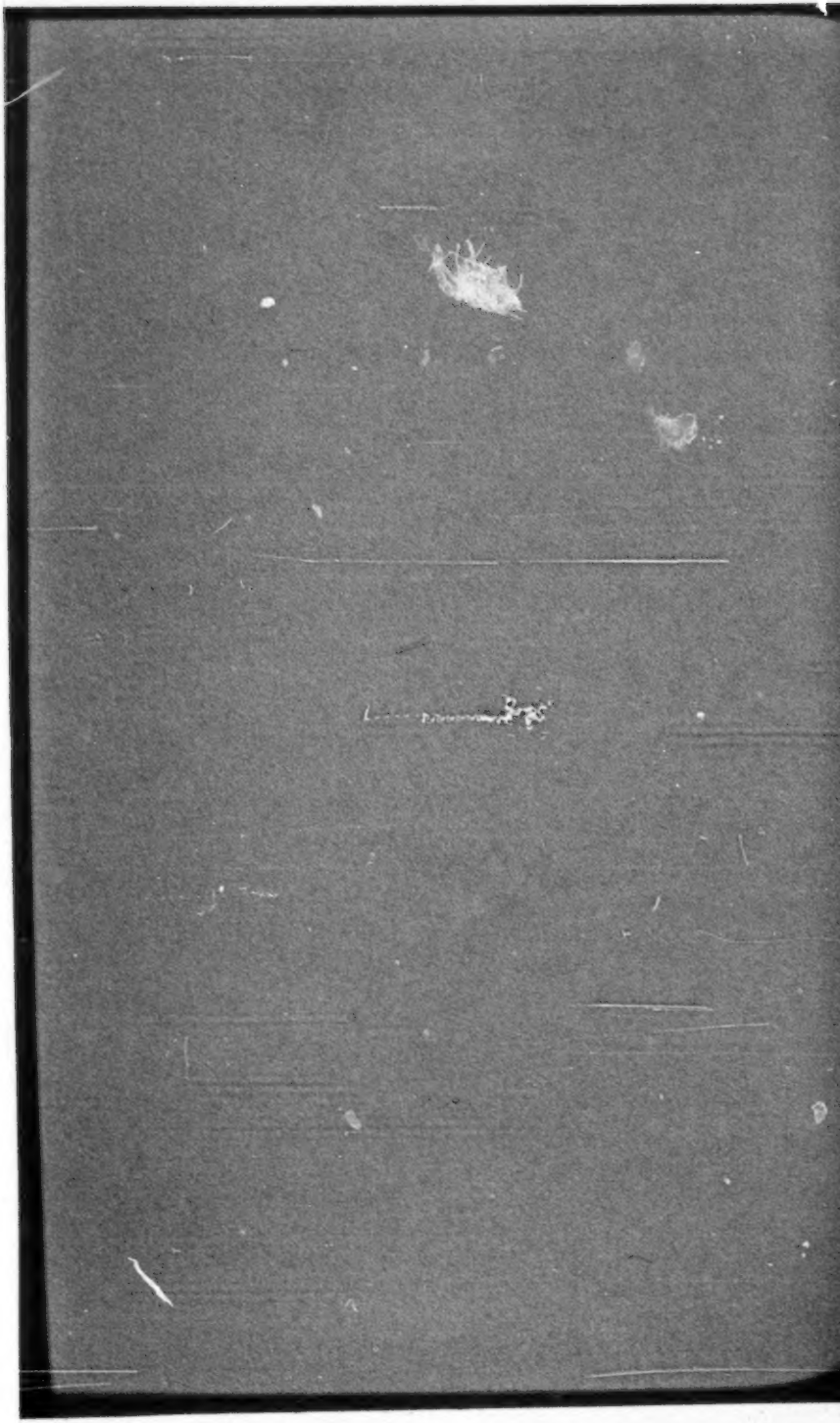

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IN THE

Supreme Court of the United States

October Term, 1955

No. _____.

C. MAXWELL BROWN, - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered upon remand by this Court for further consideration and affirming his conviction for violation of Section 145(b), Title 26, United States Code.

OPINIONS BELOW.

The District Court wrote no opinion. On appeal, the United States Court of Appeals entered an order (no opinion) affirming the District Court and reported in 209 F. 2d 260. Upon remand by this Court on

January 10, 1955, for further consideration (75 S. Ct. 311) the United States Court of Appeals entered an opinion dated August 12, 1955, and not yet reported. See Appendix, p. 36.

JURISDICTION.

The judgment of the United States Court of Appeals was dated and entered on August 12, 1955. An order of this Court extending the time to and including October 11, 1955, in which to petition for a writ of certiorari was entered on August 29, 1955. An order of the United States Court of Appeals staying mandate for a period of thirty days or any extension granted by the Supreme Court was entered on August 29, 1955.

The jurisdiction of this Court is invoked under Section 1254(1) and Section 2101(d) of Title 28, United States Code, and Rule 37(c) of the Rules of Criminal Procedure for the United States District Courts and Rule 22(2) Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED FOR REVIEW.

1. *Was the admission of the Government's evidence concerning petitioner's opening net worth and increases in net worth attributable to taxable income so prejudicial that the petitioner did not receive a fair trial?*

2. *Was the court's charge to the jury, concerning evidence of net worth and "willfulness", in substantial error?*

3. *Was the evidence which the petitioner gave to the revenue agents obtained from him by deceit and coercion and used to convict him, contrary to the Fourth and Fifth Amendments to the United States Constitution?*

CONSTITUTION INVOLVED.

Amendments to the Constitution, Article IV, reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Amendments to the Constitution, Article V, reads:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; nor shall be compelled in any criminal case, to be witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATUTES INVOLVED.

Title 26, U. S. C., Section 145, reads as follows:

> "(b) Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Rules 30 and 52(b) of The Federal Rules of Criminal Procedure read as follows:

> "Rule 30. Instructions.
>
> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the

grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

"Rule 52(b). Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE.

Petitioner is a lawyer. He was indicted on March 2, 1953, by a Federal grand jury for violation of U. S. C., Title 26, Section 145(b) (R. 4a). The indictment was in two counts. It was alleged in the first count that he willfully and knowingly attempted to defeat and evade income tax which he owed for the calendar year 1946 by filing a false and fraudulent return, wherein he reported his net income as $6,244.51, and tax as $858.40, whereas, he well knew his net income from salary and legal fees was $16,251.93 and his tax was $4,159.48. The allegations in the second count for the calendar year 1947 are the same as in the first except that the net income reported was the sum of $3,037.09 and the tax was $197.05, whereas, his net income from legal fees was $14,444.96 and the tax was $3,411.76 (R. 4a, 5a).

The case was tried to a jury primarily as a net worth case. The Government introduced in evidence, over petitioner's objections, two net worth statements as Government Exhibits 27 (R. 113a-119a) and 28 (R. 138a-155a). Also, it introduced in evidence another net worth statement as Government Exhibit 32 which

was prepared by a former auditor of the petitioner (R. 18a). All were on exhibit in the juryroom during deliberation on a verdict (R. 229a).

Government Exhibit 32 covers the years 1942 through 1948. On objection to admission of testimony of figures on Government Exhibit 32 as to years prior to the years involved, the court held that the "objection would go to the weight of it, not to its competency" (R. 147a). No witness gave any evidence whatsoever to support the Government's net worth statement for the years prior to 1945.

Government Exhibit 28 was similar to Government Exhibit 32 and the difference in the total amount over the whole period was no more than a few hundred dollars (R. 147a).

Government Exhibit 27 covered the period 1945 through 1947 (R. 119a).

Government Exhibit 32 (R. 18a) shows a sale of the Sydney Avenue home in 1948 and that petitioner slightly over-reported his 1948 income but it fails to take into account a non-taxable gain from the sale. Mr. Brown testified that he sold the home for $14,000.00 (R. 17a). His 1948 income tax return was filed in evidence as Defendant's Exhibit 5 (R. 172a).

Petitioner disputed the accuracy of the three net worth statements. Government Exhibit 27 showed petitioner to have three cars in 1946. Revenue agent Venable admitted that one car was included in error (R. 130a).

A Cadillac car was listed as an asset at a cost of $3,024.25 in 1947, in Exhibit 27, at a cost of $3,477.59

on Exhibit 32. Petitioner's wife purchased this car in her name and paid $1,250.00 of her separate money for it. Petitioner paid $1,250.00 of his money on the purchase price and a 1941 Chevrolet was traded for a credit of $524.25 on the Cadillac (R. 173a, 69a).

A Criscraft motor boat was listed as an asset on the net worth statements at a cost of $1,250.00. Mrs. Brown paid $1,000.00 of her separate money for the boat and the petitioner paid $250.00 of his money for it (R. 173a). The boat was sold in 1948 (R. 173a), and $1,000.00 of the proceeds of sale was returned to Mrs. Brown and a package bearing her name and containing $1,000.00 was found in petitioner's safe-deposit box by the revenue agent (R. 173a).

Mrs. Brown inherited $750.00 and she saved $3,000.00 from teaching school prior to the years involved and these funds were claimed by the petitioner to have been merged in the Government's net worth statements as increases in his net worth.

Furniture acquired prior to the critical period was sold in 1947 for $800.00 and reinvested in new furniture in that year for which the petitioner was charged as an increase in net worth.

Petitioner had $4,000.00 in his safe-deposit box at the beginning of the net worth period and no allowance was made for this beginning asset in the Government's net worth statements, because the agent assumed that no more cash was on hand at the beginning of the period than at the end (R. 176a).

Petitioner owed no debts at the beginning of the period and had on deposit, in two banks, over $3,000.00.

Petitioner owed $15,000.00 at the end of the period and had on deposit in two banks less than $1,400.00 (R. 18a, Exhibit 32).

Exhibit 32 shows no unreported income in 1948 and also shows an error of omitting a credit for non-taxable gain from the sale in 1948 of the Sydney Avenue home in the sum of $2,367.30 as reported in 1948, and this indicates error in a prior year or that petitioner over-reported his income in 1948. This lead was not pursued.

Petitioner's explanation of the bulge in his net worth during the critical period, aside from omitting his begining cash, excessive charges for living expenses and merging his wife's funds in his net worth, was that he handled law cases for clients with an agreement that his fee in such cases would be contingent upon his handling the case to a satisfactory completion and if not, any receipts in the case would be refunded to the client. In certain cases he recovered funds for his client, but due to some factor in the case, such as a minor being involved or an estate being involved, the case was not completed in that year, and petitioner did not then report as his income any portion of such funds. When the case was completed, he reported the fee as his income and paid the tax. In some instances he made refunds to clients (R. 159a). In 1946, petitioner received and held $7,300.00 of such funds. In 1947, he received $5,300.00. These receipts were reported in his 1948 and 1949 income tax returns and the tax was paid (R. 172a). Petitioner obtained advice of counsel about this method and he was referred to

another lawyer's case in point, namely, *Allen* v. *Commissioner*, 5 T. C. (R. 165a).

The Government took issue with petitioner on his method of reporting fees. It introduced at the trial a total of forty witnesses. Thirty-nine witnesses did not testify whether petitioner's agreement for fee was contingent or not (App., pp. 1-2). One witness, Cornelius Hubbuch, did so testify and said that the fee was contingent (R. 75a).

Twenty-five of the Government witnesses did not testify on whether any case handled by petitioner was completed in the year in which money was recovered in the case (App., p. 1). Nine witnesses gave indefinite and inconsistent testimony on this issue. Five Government witnesses gave testimony on this issue unfavorable to petitioner. One Government witness gave testimony on this issue favorable to petitioner.

The fees involved in the cases in which the five witnesses gave unfavorable testimony total $2,495.00 and all were received in 1947 (App., p. 2). Petitioner's explanation, if accepted, would result in no unreported income (App., p. 33).

The instructions which petitioner offered in the case were not given (R. 46a).

Portions of the court's instructions to the jury about which petitioner complains follows:

> "In this case there is evidence of the subsequent payment by or for the defendant of some of the tax liability for the years covered by the indictment. You will recall that Mr. Brown has testified that in 1950, in making up his tax return for the

year 1949 that he reported and paid taxes on the income which the government contends should have been reported in '46 and '47. There is a distinction which I pointed out to you between civil liability and criminal liability. This is a criminal case, and the fact that the defendant has or may have or may have not paid or settled the civil liability for the taxes involved in these years is not in and of itself evidence of a defense—it is not a defense in and of itself to the charges embodied in this indictment. That testimeny is permitted to go to you for the purpose of reflecting the intent, if it does do so, and you are the judges as to whether it does and the effect to be given that testimony" (R. 224a).

This instruction is a finding of fact by the court that taxable income was not reported.

"The Government has introduced in evidence here testimony of the defendant's net worth or the increase in his net worth or estate, beginning with what is called a basic date—that is, December 31st, 1945, which establishes the worth as of the first day of the calendar year 1946. Then if the testimony will properly show all of his assets and all of his property at the end of that year, then the difference in those two amounts will reflect the income" (R. 223a).

This instruction omits a liability of $15,000.00 which petitioner owed at the end of 1947.

"* * * An individual taxpayer may deliberately and wilfully seek to lessen the amount of his actual legal income tax. That conduct is what we refer to as tax evasion" (R. 222a).

"The term 'knowing'—knowing the return to be false and charge that the evasion was wilfully attempted or attempt was wilfully made, are so closely connected that substantially they may be considered by a juror as one" (R. 224a).

"* * * And it becomes your duty as jurors to determine * * * whether or not the defendant, Brown, attempted by filing false income tax returns to evade or defeat the United States income tax law, or any part of it, the tax applicable to him for each of the years involved" (R. 222a).

"In this case, the positive acts are said by the government to be the filing of a false return in each of the years. I charge you that if the acts were wilfully done, they are sufficient to constitute the violation of the statute here involved" (R. 225a).

"If you believe from a consideration of all the evidence that the defendant for the years in question, 1946 and 1947, signed and filed the income tax returns filed by him as a wilful attempt to evade or defeat the tax imposed on him by law, your verdict should be guilty. * * *" (R. 228a).

"If you should find, however, that the defendant knowingly and wilfully failed to keep proper records or to honestly report his income and should find beyond a reasonable doubt such failure was for the purpose of having the return show a lesser tax than was really due, then your verdict should be guilty if consistent with the other principles which I have given under the law" (R. 227a).

The court did not instruct the jury that the Government should establish a firm beginning net worth point nor that leads to non-taxable income should be

traced, nor concerning a reasonable allocation of alleged unreported income to specific year nor that increases in net worth must be traceable to taxable income, nor correctly explain to the jury the nature of the net worth method, and point out the assumptions on which it rests and the inferences available to the accused.

Seven days after petitioner was indicted he made a motion to suppress evidence of checks, letters, memorandums, names of clients and schedules which deputy collector Brumleve obtained from him against his will and by coercion and deceit (R. 8a). At a hearing before the court it appears that Mr. Brumleve went to petitioner's office on the morning of January 3, 1950. He wanted to make a routine examination of petitioner's tax returns and he requested permission to inspect petitioner's safe-deposit box immediately. Petitioner objected that he had no right to inspect the box. Mr. Brumleve insisted that he was making a routine inspection and that he had the right to inspect the box and unless permitted to do so he would obtain a court order to compel it. Petitioner then let Mr. Brumleve inspect the box.

The following morning Mr. Brumleve returned to petitioner's office and also special agent Venable appeared there at about the same time. Mr. Brumleve conferred with the petitioner first and again requested records for examination. He exhibited his credentials and assured petitioner that the examination was for civil purposes and unless permitted to proceed, he would compel an examination by court order. Thereupon, petitioner asked leave to confer with counsel by

telephone. He recited the circumstances to counsel and was advised that he had done all he could do except go to court. Petitioner believed that Brumleve was acting in earnest and then permitted him to examine his records. Venable joined in the examination without making known to the petitioner that he was there in search of fraud for criminal prosecution (R. 132a, 26a).

Agents Brumleve and Venable denied that petitioner made any objection to the examination.

The court denied the motion to suppress evidence.

During the trial, Mr. Brumleve was present but did not testify. Mr. Venable admitted on cross-examination that he was called by Mr. Brumleve on January 3, 1950, to join in the examination. He admitted that he joined in the examination to find and to develop evidence for prosecution (R. 127a). The court refused to reconsider further evidence of petitioner that he was deceived and compelled to give evidence against himself after Mr. Venable admitted that he was called to examine for fraud by Mr. Brumleve who was at the same time telling petitioner that the examination was for civil purposes.

REASONS FOR GRANTING THE WRIT.

1. The Admission of the Government's Evidence of Net Worth Was Prejudicial.

(A) A BEGINNING NET WORTH WAS NOT ESTABLISHED WITH REASONABLE CERTAINTY.

The decisions below are in conflict with decisions of this Court in *Holland* v. *U. S.*, 348 U. S. 121, 75 S. Ct. 127, based on the fact that the Government did not establish with reasonable certainty a beginning net worth.

All amounts involved in this case are comparatively small and, therefore, each item in the net worth statement is important.

A Criscraft motor boat was listed in each of three net worth statements as a beginning asset at a cost of $1,250.00 to the petitioner. This is error. Petitioner paid $250.00 of the purchase price and his wife paid the balance of $1,000.00 with her separate funds from teaching school (R. 174a).

Petitioner's wife had inherited $750.00 and had saved $3,000.00 from teaching school, which funds were in the safe-deposit box at the beginning period. Also, she owned a lot on Bon Air Avenue which she sold in 1945 for $1,000.00. These funds were on hand at the beginning of the critical period and were used during the years involved to purchase and furnish a new home. These amounts were not taken into account in the opening net worth nor as non-taxable funds received by the petitioner from his wife during the years

involved. He was charged with them as taxable increases in net worth.

Petitioner had accumulated home furnishings in his Sydney Street home prior to the critical net worth period and they were sold in 1947 for $800.00, which amount was reinvested in the same year in furnishings for the new home. The total cost of the new furnishings were charged against the petitioner as increased assets in 1947.

Petitioner had $4,000.00 in cash in his safe-deposit box at the beginning net worth period, January 1, 1946 (R. 176a). He owed no debts then. No cash on hand was taken into account in each of the three net worth statements.

(B) ADDITIONS TO NET WORTH IN THE YEARS INVOLVED WERE NOT ATTRIBUTABLE TO TAXABLE INCOME AND INCLUDED THE SEPARATE ASSETS OF THE PETITIONER'S WIFE.

A Cadillac car was purchased by Mrs. Brown on March 29, 1947, in her name at a total cost of $2,500.00 in cash, and a credit allowance of $524.25 for a 1941 Chevrolet (R. 69a). Mrs. Brown paid $1,250.00 from her separate funds in cash and petitioner paid $1,250.00 by check on his funds to purchase the Cadillac (R. 173a). A lead and pertinent fact was whether Mrs. Brown entered the safe-deposit box on that date. Petitioner was charged with the entire purchase price as his asset in the three net worth statements.

Petitioner's wife had her other savings in the safe-deposit box at the opening net worth period and this fund was expended to furnish the new home in 1947.

Mrs. Brown's funds were merged in the petitioner's net worth statements and he was charged with the resulting increases in assets.

Petitioner was charged in the Government's net worth statement in Exhibit 27 with having on hand three cars in 1946. Mr. Venable admitted this was error as to one car.

Petitioner urges that these items are critical in his case and bring the issue involved squarely within the principles of Holland v. U. S., *supra.* He urges that the Government may well have won the jury with its net worth evidence of a Criscraft motor boat, a Cadillac car, three cars in 1946 and two homes in 1947. These items were identified in net worth statements and exhibited in the juryroom. The burden, thus cast on the petitioner, was too great for him to overcome with the truth that he had expended $250.00 for the boat, $1,250.00 for the Cadillac and borrowed $15,000.00 to buy one home. The effect was to convict the petitioner on evidence of his wife's assets.

This case is unlike *Holland* v. *U. S., supra,* in that it is not attended with the usual badges of fraud.

The only direct evidence produced by the Government in this case concerns receipts which petitioner claims were contingent fees. The Government claims they were reportable in the years involved. Petitioner reported them in the two succeeding years, which was nearly three years before the indictment.

If such fees were contingent, they were properly reported, and the increases in net worth due to them

in the years involved would not be attributable to taxable income.

Although the case was tried primarily as a net worth case the Government has contended on appeal and the Court of Appeals so held that the government produced direct evidence sufficient to sustain the verdict.

Petitioner contends that the Government's evidence concerning the contingent fees erroneously reflected taxable increases in net worth in the years involved and that the court erroneously directed the jury that petitioner's evidence of his method of reporting such fees on advice of counsel was no defense. Only his payment of the tax was submitted to the jury on the issue of intent.

The Government's direct evidence of alleged omitted income consisted wholly of proof that petitioner received $4,059.60 in 1946 which was not included in his return for that year, and that he received $5,211.66 in 1947 which was not included in his return for that year. Petitioner admitted that he received $7,300.00 as contingent fees in 1946, including the sum proved by the Government and that he received $5,700.00 as contingent fees in 1947, including the sum proved by the government and he testified that all the receipts in each instance were contingent receipts and were properly reported in 1948 and 1949 when the contingency ended (R. 172a).

Petitioner was advised by counsel on this method of reporting contingent receipts and he specifically followed a case in point, *Allen* v. *Comm.*, 5 T. C. 1232.

The trial court did not give the instructions which petitioner offered on these issues. Instead, the court instructed the jury that petitioner's evidence was admitted only on the issue of intent.

The Court of Appeals decided this issue on authority of *Healy* v. *Commissioner,* 345 U. S. 278, and *North American Oil Consolidated* v. *Burnet,* 286 U. S. 417. However, in each of these cases the money was received under a claim of right. Petitioner testified that he did not receive nor hold these funds under a claim of right. No witness disputed this. Five witnesses said the case was terminated in the year in which the money was received, but none testified that the fee was not contingent. The Court of Appeals said:

> "The jury was justified in rejecting his explanation that the fees were contingent." (Appendix, p. 39.)

Petitioner's explanation that the fees were contingent was not submitted to the jury. The trial court told the jury that such evidence was not a defense as follows:

> "In this case there is evidence of the subsequent payment by or for the defendant of some of the tax liability for the years covered by the indictment. You will recall that Mr. Brown has testified that in 1950, in making up his tax return for the year 1949 that he reported and paid taxes on the income which the government contends should have been reported in '46 and '47. There is a distinction which I pointed out to you between civil liability and criminal liability. This is a

> criminal case, and the fact that the defendant has or may have or may have not paid or settled the civil liability for the taxes involved in these years is not in and of itself evidence of a defense—it is not a defense in and of itself to the charges embodied in this indictment. That testimony is permitted to go to you for the purpose of reflecting the intent, if it does do so, and you are the judges as to whether it does and the effect to be given that testimony" (R. 224a).

Petitioner's position is that except the finding of willfulness the trial court decided the whole case on direct evidence against the petitioner.

The decisions below are in conflict in principle with the Seventh Circuit in *U. S.* v. *Raub,* 177 Fed. 2d 312, wherein the court said:

> "We think the fair interpretation of these instructions is that they assumed that there was only one issue to be decided by the jury, namely, that of intent, and, in effect they amounted to the direction of the verdict, on the issue of falsity and fraudulence. * * *"

The court omitted to instruct the jury that petitioner claimed to have followed the advice of counsel in making his return in good faith according to an approved method.

The decisions below are in conflict with the Seventh Circuit in the case of *U. S.* v. *George E. Phillips,* 217 Fed. 2d 435, where the trial court was reversed because an instruction on advice of counsel was refused.

The decisions below are in conflict with the Tenth Circuit in the case of *Haegler* v. *U. S.*, 172 F. 2d 986.

The Court of Appeals said:

> "* * * While he had two bank accounts and a safety deposit box in which he kept currency in varying amounts, their totals were never, during the years involved, sufficient to make adequate refunds to clients if he had been obliged to do so." (App., p. 39.)

The undisputed Government's evidence is that petitioner had $4,966.76 in cash at the First National Bank and also $10,121.62 in cash at the Louisville Trust Company at the end of 1946 (Exhibit 36, R. 18a, and Venable, R. 120a). The contingent fees in that year were admitted to be $7,300.00 and petitioner claimed to have $4,000.00 of this amount in his safe-deposit box. In any event, petitioner's cash on hand in 1946 was more than twice the amount of contingent fees in that year. In 1947 the cash on hand at the end of the year was less than the contingent fees.

However, the agreement for the fee was silent on how the money should be held pending the contingency. Use of the receipts was not made a critical factor in *Hanna* v. *Commissioner*, 156 F. 2d 135.

The decisions below are in conflict with the Ninth Circuit in the case of *Hanna* v. *Commissioner*, 156 F. 2d 135, which cited as authority *North American Oil Consolidated* v. *Burnet, supra*, and *Allen* v. *Commissioner, supra*.

This is a criminal case and since the court did not give the accused the benefit of the safeguards prescribed in *Holland* v. *U. S., supra,* even though not called to the court's attention under Rule 30 of the Federal Rules of Criminal Procedure, the several errors in the aggregate amount to substantial injury and plain error. Rule 52(b) of the Federal Rules of Criminal Procedure, 18 U. S. C. A. should apply.

2. The Court's Charge to the Jury Concerning Net Worth Evidence and Willfulness Is in Substantial Error.

(A) NET WORTH EVIDENCE.

The court instructed the jury:

> "The Government has introduced in evidence here testimony of the defendant's net worth or the increase in his net worth or estate, beginning with what is called a basic date—that is, December 31st, 1945, which establishes the worth as of the first day of the calendar year 1946. Then if the testimony will properly show all of his assets and all of his property at the end of that year, then the difference in those two amounts will reflect the income" (R. 223a).

Petitioner urges that this instruction is wholly inadequate. It defines income in terms of assets while omitting liabilities and particularly $15,000.00 which petitioner owed to a bank in 1947. It tells the jury as a matter of law in its effect that "the Government has introduced in evidence here testimony of the defendant's net worth or estate * * * which estab-

lishes the worth as of the first day of the calendar year 1946."

This instruction did not submit to the jury the issue of establishing a firm opening net worth. It omitted to instruct the jury that increases in net worth must be attributable to taxable income. This error is admitted by the Government in its brief on the original petition for certiorari and stated in these words:

> "As an abstract proposition, the trial court's instruction on the subject of the net worth computation (R. 223-224) may be open to criticism in that it does not clearly point out that the annual increases in net worth must be traceable to taxable income. * * *" (Government's Brief, Case No. 133, October Term 1954, page 11.)

The court omitted to instruct the jury concerning the nature of the net-worth method, and point out the assumptions on which it rests and the inference available to the accused.

The court omitted to instruct the jury on allocation of increases in net worth to specific years.

In the foregoing respects, the decisions below are in conflict with the opinion of this Court in Holland v. U. S., *supra*.

(B) WILLFULNESS.

The court instructed the jury:

> "* * * An individual taxpayer may deliberately and wilfully seek to lessen the amount of his actual legal income tax. That conduct is what we refer to as tax evasion" (R. 222a).

This statement of the law is in conflict in principle with the decision of this Court in *Spies* v. *U. S.*, 317 U. S. 492.

The court instructed the jury:

> "The term 'knowing'—knowing the return to be false and charge that the evasion was wilfully attempted or attempt was wilfully made, are so closely connected that substantially they may be considered by a juror as one" (R. 224a).

Petitioner's objection to this instruction is that the court has assumed as matter of law that the specific intent to evade tax accompanies the act of willfully filing a false return. The jury is not permitted to find whether the tax evasion motive was present in the act of willfully filing a false return. This interpretation of the law is in conflict in principal with the decision of this Court in *Spies* v. *U. S., supra.*

The court instructed the jury:

> "In this case, the positive acts are said by the government to be the filing of a false return in each of the years. I charge you that if the acts were wilfully done, they are sufficient to constitute the violation of the statute here involved" (R. 225a).

Again the court has assumed as a matter of law the presence of willful intent to evade tax from the act of willfully filing a false return. Petitioner objected to this instruction when it was given (R. 228a). This concept has been urged as error in each step of this case.

The Government uses a simple form of indictment under section 145(b). The Instruction in this case, if finally approved, is a pattern suitable for a restricted standard form sufficient to sustain conviction on merely submitting to the jury whether the accused willfully filed a false return. The real result is that the Government need only to prove that the accused made a false return.

Thus the protective proceedings generally accorded an accused in a criminal case are trimmed away in a tax evasion case.

The court instructed the jury:

> "If you believe from a consideration of all the evidence that the defendant for the years in question, 1946 and 1947, signed and filed the income tax returns filed by him as a wilful attempt to evade or defeat the tax imposed on him by law, your verdict should be guilty * * *" (R. 228a).

The court omitted to tell the jury that a willful tax evasion motive must be present when petitioner signed and filed the income tax return in order for such act to qualify as a willful attempt to evade or defeat tax. This statement of the law is in conflict in principle with the decision of this Court in *Spies* v. *U. S., supra.*

The court instructed the jury:

> "If you should find, however, that the defendant knowingly and wilfully failed to keep proper records or to honestly report his income and should find beyond a reasonable doubt such failure was

for the purpose of having the returns show a lesser tax than was really due, then your verdict should be guilty if consistent with the other principles which I have given under the law" (R. 227a).

Here the court has said that a willful omission of a duty is alone sufficient for guilt as charged. This statement of the law is in conflict with the opinion of this Court in *Spies* v. *U. S., supra.*

The court by re-emphasizing this concept of willfully filing a false return oversimplified the Government's case. It did not include the petitioner's defense that he reported his income by a method adopted in good faith. Even if incorrect, it was an honest misconception of the law. Further, he acted on advice of counsel. Petitioner was an unequal litigant in this case. The Government's case was repeatedly emphasized. Petitioner's defense was not submitted to the jury.

3. Was Certain Evidence Obtained From the Petitioner and Used to Convict Him Contrary to the Fourth and Fifth Amendments to the United States Constitution?

The trial court declined to suppress certain evidence where it appeared that two agents were examining petitioner's records to obtain evidence of fraud for prosecution (R. 172a), while one of them was telling the petitioner that the examination was a "routine check" (R. 32a) for civil purposes and threatened court action to compel the examination (R. 35a).

The evidence thus obtained, together with alleged admissions, was used in a net worth case as a basis for inferences or proof of tax evasion.

The conduct of the agents in this case disclose a pattern of common practice in the administration of the revenue laws by which a taxpayer is led to believe he is obeying his duty to permit a search of his records for civil purposes, when, in fact, the agent, by deceit, is searching for evidence for criminal prosecution.

The 1950 Report of the American Bar Association's Committee on procedure in fraud cases states:

> "The bureau officials seem to feel * * * that a practice of advising taxpayers of their constitutional rights at the beginning of a special agent investigation would unduly alarm a large proportion of those investigated whose cases are dropped after a routine check."

In the case of *Montgomery* v. *U. S.*, 203 F. 2d 887, the agent explained to the taxpayer that he desired to make a "routine check".

In the case of *U. S.* v. *Wolrich,* 119 F. Supp. 538, the revenue agent explained to the taxpayer that he was making the "usual routine audit", and introduced the special agent as a "fellow revenue agent".

In the case of *U. S.* v. *Lipshitz,* 117 F. Supp. 466, the agent explained to the taxpayer that he was making a "routine examination", when, in fact, he intended criminal prosecution.

In petitioner's case agent, Mr. Brumleve said:

> "* * * He asked me 'Why are you checking me?' I said 'Well, it is a routine check'" (R. 32a).

In petitioner's case, in answer to the question whether petitioner objected to giving information, agent Brumleve said:

> "I don't know what you would call objection, I don't think he did" (R. 28a).

The decisions below are in conflict in principle with the decisions of this Court in the case of *Boyd* v. *U. S.*, 116 U. S. 616, and also in the case of *Go-Bart Importing Company* v. *U. S.*, 282 U. S. 344.

The decisions below are in conflict in principle with the Eighth Circuit in the case of *Hanson* v. *U. S.*, 186 F. 2d 61.

The decisions below are in conflict in principle to the Tenth Circuit in the case of *Bowles, etc.* v. *Beatrice Creamery,* 146 F. 2d 774 (non-tax).

The decisions below are in conflict in principle with the Court of Appeals of the District of Columbia in the case of *Nelson* v. *U. S.*, 208 F. 2d 505 (non-tax).

The decisions below are in accord in principle with the Fifth Circuit in the case of *Montgomery* v. *U. S.*, 203 F. 2d 887.

The decisions below are in accord in principle with the Third Circuit in the case of *Nicola* v. *U. S.*, 72 F. 2d 780.

The District Court in the Third Circuit, in the case of *U. S.* v. *Guerrina,* 112 F. Supp. 126, treated the

issue as one of first impression and declined to follow in principle the case of *Nicola* v. *U. S., supra,* in the same circuit and expressly followed the principle declared in the Eighth Circuit in the case of *Hanson* v. *U. S. supra.*

In *U. S.* v. *Guerrina, supra,* the Government petitioned for a reargument on the ground that "the question of the dividing line between proper investigative procedures and those which encroach improperly upon constitutionally granted rights in an issue of such vital importance to the Government that the matter warranted further consideration by the court."

A District Court in the Seventh Circuit, in the case of *U. S.* v. *Manno,* 118 F. Supp. 511, expressed with approval the same principles declared in the case of *U. S.* v. *Guerrina, supra,* but it decided the issue in favor of the Government upon a finding of fact, unlike the instant case, that criminal prosecution was not contemplated when the revenue agents interviewed the defendant and found that when evidence of criminal fraud was uncovered the agents warned the defendant that the matter would be referred to the intelligence division.

In *Nicola* v. *U. S., supra,* it was held that the defendant must claim and stand on his right of immunity before the revenue agent and refuse to produce his books or evidence. Thus, he is placed in peril of being in violation of the law regulating civil duties or waive any right which he may have under the Constitution.

Petitioner believed that the agents had authority to compel him to give information for civil purposes and to subject him to punishment for willful failure to do so. He would have no defense in such action if the agents were, in fact, seeking information only for civil purposes.

Acquiescence reasonably attributable to a regard to an authority of the law is not a waiver. *Amos* v. *U. S.*, 255 U. S. 313 (non-tax).

The issue of whether petitioner consented to the examination of his records was not submitted to the jury. The court sustained the Government's objection to petitioner's testimony of how the agent obtained evidence from him on January 3, 1950 (R. 159a, 218a). This evidence was excluded contrary to the decision of this Court in *Powers* v. *U. S.*, 223 U. S. 303. Also, the decisions below on this issue are in conflict with the Third Circuit in the case of *U. S.* v. *Burdick*, 214 F. 2d 768, where the court said:

> "Such testimony cannot be excluded when subsequently offered at his trial."

Consent to give information waives the constitutional immunity but it was held in principle by this Court in *Go-Bart Importing Company* v. *U. S.*, *supra*, that such consent must not be induced by misrepresentation, fraud, trickery, promises or threats.

Petitioner raised this issue before the trial court on motion to suppress evidence and to dismiss the indictment, on motion for directed judgment of acquittal, on motion for a new trial and also before

the United States Court of Appeals. He stands in the same position of innumerable persons who were under examination of the Internal Revenue Laws and whose constitutional rights were denied them in the zeal of examining agents to acquire in a wrong way vital evidence on which to base proof of tax evasion. This issue is in need of clarification and decision by this Court.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEE S. JONES,
J. WALTER CLEMENTS,
HELEN R. GRAFT,
Counsel for Petitioner.

APPENDIX.

Petitioner's list and classification of Government's witnesses:

1. Witnesses who gave no testimony concerning whether a case was closed in the same year in which a fee was paid:

		Page
1.	Ella P. Rondi	54a
2.	Shelby Hardesty	56a
3.	F. R. Edney	57a
4.	George W. McMillan	61a
5.	Richard Staub	63a
6.	Romono Mazzoli	65a
7.	Joe Alegeir	66a
8.	Louis N. Garlove	67a
9.	Robert Eby	68a
10.	Leroy George Droppelman	69a
11.	Matthew B. Senn	71a
12.	Scott Miller	77a
13.	Thomas A. Ballentine, Jr.	77a
14.	George Schuhmann	81a
15.	Delos H. Schluter	82a
16.	Jack Crofton	84a
17.	Albert F. Thomas	88a
18.	Jerome L. Brooks	88a
19.	Ansel C. Rogers	92a
20.	Fred A. Williams	93a
21.	James F. Donoho	102a
22.	George W. Lenz, Jr.	103a
23.	Emily Benner	105a
24.	Levoy G. Venable	106a
25.	Wallace Wallen	145a

2. Witnesses who gave indefinite testimony on whether the case was closed in the same year as when a fee was paid:

1. Dan T. Gray, Jr. 58a
2. Edwin Roby 71a
3. Joseph W. Flanagan 75a
4. Callie Lynch 79a
5. Paul Hagan 83a
6. Helen Kirtley Shields 85a
7. C. K. Hughes, Jr. 98a
8. W. D. Selby 101a
9. C. J. Hoehler 101a

3. Witnesses who gave unfavorable testimony that a case was closed in the same year in which a fee was paid.

1. Lee Miller 90a
2. Douglas Ladlee 95a
3. I. Sidney Jenkins 97a
4. Allen Poulter 99a
5. Marjory W. Duckwall 108a

RESULTING NET WORTH STATEMENT

According to Evidence

ASSETS:	1945	1946	1947
1. First National Bank	$ 140.70	$ 4,966.76	$ 1,356.69
2. Louisville Trust	3,127.82	10,121.62	17.72
3. Office Equipment	2,255.00	2,378.65	2,378.65
4. Sydney Street Home	9,265.40	9,265.40	9,265.40
5. Indian Hills Lot	0	0	4,040.00
6. Indian Hills Residence	0	0	26,220.70
7. Indian Hills Furnishings	0	0	2,053.18
8. Criscraft Boat	1,250.00	1,250.00	1,250.00
9. Cadillac	0	0	2,597.75
10. 1941 Ford	600.00	0	0
11. 1941 Chevrolet	977.59	977.59	0
12. 1946 Chevrolet	0	1,050.00	1,050.00
13. U. S. Bonds	1,031.25	1,031.25	1,031.25
14. Sydney Street Furnishings	1,500.00	1,500.00	700.00
15. Cash in Safe—Deposit Box	4,000.00	4,000.00	1,590.00
16. Cash—Wife's Savings & Inher.	3,750.00	3,750.00	0
Total Assets	$27,897.76	$40,291.27	$53,551.34
LIABILITIES:			
17. Citizens Fidelity Bank	$ 0	$ 0	$15,000.00
18. Reserve for Dep. of Furniture	880.75	1,112.39	1,350.26
19. Reserve for Dep. 1941 Chev.	696.53	843.17	0
20. Reserve for Dep. Cadillac	0	0	292.25
21. Clients' Contingent Receipts	0	7,300.00	5,653.79
Total Liabilities	$ 1,577.28	$ 9,255.56	$22,296.30
22. Net Worth	$26,320.48	$31,035.71	$31,255.04
23. Prior Net Worth		26,320.48	31,035.71
24. Increases		$ 4,715.23	$ 219.33
25. Insurance		402.87	379.45
26. Federal Tax Paid		150.00	771.46
27. Living Expenses		1,800.00	2,400.00
		$ 7,068.10	$ 3,770.24
28. Less Standard Deduction		500.00	500.00
29. Corrected Net Income		$ 6,568.10	$ 3,270.24
30. Income Reported		6,244.51	3,037.09
31. Difference		$ 323.59	$ 233.15
32. Unidentified Liabilities		323.59	2,239.84
33. Unreported or over-reported income		None (over)	—2,006.69

CERTIFIED COPY OF ORDER OF THE SUPREME COURT REMANDING CASE.

(Filed February 12, 1955)

On writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

This cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Sixth Circuit, and was duly submitted.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Sixth Circuit for consideration in the light of Holland v. United States, Friedberg v. United States, Smith v. United States, and United States v. Calderon, decided by this Court December 6, 1954.

January 10, 1955.

Mr. Justice Black dissents.

A true copy

Test: Harold B. Willey,
Clerk of the Supreme Court
of the United States

(Seal)

By Hugh W. Barr, Deputy

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED.

April 26, 1955—Before: Simons, Chief Judge, Allen and McAllister, Circuit Judges.

This cause is argued by Lee S. Jones and J. Walter Clements for appellant and by Charles M. Allen for appellee and is submitted to the court.

JUDGMENT.

(Filed August 12, 1955)

Appeal from the District Court of the United States for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

OPINION.

(Filed August 12, 1955)

No. 11980

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

C. Maxwell Brown, - - - - - - Appellant,

v.

United States of America, - - - - - Appellee.

Appeal from the United States District Court
for the Western District of Kentucky.

Decided August 12, 1955.

Before Simons, Chief Judge, Allen and McAllister, Circuit Judges.

Simons, Chief Judge. From our decision affirming his conviction for wilfully attempting to defeat and evade income taxes for 1946 and 1947, the appellant sought certiorari from the Supreme Court of the United States and the writ issued. In a series of cases wherein the "net worth" method of proof was followed by conviction, the Supreme Court undertook a general consideration of this technique, noted its widespread use, and, while upholding its admissibility as circumstantial evidence, cautioned a close scrutiny of its use because fraught with danger to the innocent.

The cases considered were Holland v. United States, 348 U. S. 121, Friedberg v. United States, 348 U. S. 142, Smith v. United States, 348 U. S. 147 and United States

v. Calderon, 348 U. S. 160. In each, conviction was upheld. The most detailed discussion of the dangers residing in the "net worth" method is to be found in the Holland case. Within a few days after these decisions were announced, the Court, per curiam, without consideration of their merits, granted certiorari in nine additional net worth cases. It set aside the affirmances therein and remanded the cases to their respective circuits for consideration, in the light of Holland and associated cases. This appeal is one of those remanded. It has now been reargued and reconsidered by us in the light of the specific cautions developed in the principal cases. We have also given study to those cases that have been reconsidered in the Courts of Appeals since their remand. They are Strauch, et al. v. United States, decided June 13, 1955, (C. A. 6), Watts, v. United States, 220 F. (2d) 483 (C. A. 10), Beaty v. United States, 220 F. (2d) 681, (C. A. 4) and Burdick v. United States, 221 F. (2d) 932, (C. A. 3). None has produced a result differing from the original decision.

The government, in the present case, produced direct proof of specific items of income omitted from the appellant's return and reinforced it by a "net worth" computation. The appellant is a lawyer. His clients gave evidence that they had paid him fees in 1946 of over $4,000.00 more than was reported in his return for that year and of over $5,000.00 more in 1947 not reported. The appellant, testifying at the trial, conceded that he had received $7,300.00 in 1946 and $5,700.00 in 1947 which he had not returned as income and upon which he had paid no tax. He explained his failure upon the ground that the fees were contingent, that he had an oral contract with each of his clients that in the event of inability to complete the work undertaken, because of other commitments, he would refund all or part of the fees received, that he had

followed this practice from 1941 on through the prosecution years, that, not being a tax lawyer, he had consulted counsel and was advised that he was not obliged to report such income until his services were completed, that when he later did complete the cases he included such fees in his income tax returns for the years 1948 and 1949 and paid the tax thereon.

The appellant reported his income on the cash receipts and disbursements methods. In Healy v. Commissioner, 345 U. S. 278, 281, it was pointed out that one of the basic aspects for Federal Income Tax is that there be an annual accounting of income and each item must be reported in the year in which it is properly reportable and in no other. It relied upon North American Oil v. Burnet, 286 U. S. 417, wherein the Court, speaking through Mr. Justice Brandeis, said: "If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he is required to return, even though it may still be claimed that he is not entitled to retain the money and even though he may still be adjudged liable to restore its equivalent." There is a claim of right when funds are received and treated by a taxpayer as belonging to him.

Had the explanation of the appellant been believed by the jury, it might have stood him in good stead on the question of wilfulness in failure to report the fees as income during the prosecution years. The government, however, introduced thirty-nine witnesses, most of them supporting its position that unreported fees had been paid to the appellant for past services in cases upon which no further work was to be done and which were finally closed in 1946 and 1947. Only one testified to an arrangement which, though not clear, was open to interpretation that part of the fee paid was for future services and contingent upon their being performed. There is no doubt that the appellant treated the money as his own. While he had

two bank accounts and a safety deposit box in which he kept currency in varying amounts, their totals were never, during the years involved, sufficient to make adequate refunds to clients if he had been obliged to do so. This is, in effect, admitted by the appellant's explanation that he could have sold his real estate and automobiles, in the event that he had failed to perform. The jury was justified in rejecting his explanation that the fees were contingent. The obligation to pay the tax and the penalty for failure to truthfully account for taxable income is unequivocally fixed by 26 U. S. C. A. § 145(b).

The government also supported its direct evidence with computations made by Revenue Agents, showing increases in net worth far in excess of reported income. There was also a computation made by a former auditor of the appellant which differed only slightly from that made by the Agents, based upon information furnished by the taxpayer. This was evidence not privileged. Gariepy v. United States, 189 Fed. 2, 459, Himmelfarb v. United States, 175 Fed. 2, 924, Williston, Evidence 3rd Ed. § 2325. Concededly, the computations were but approximations and lacked precision. They showed a result, however, indicating a substantial increase in net worth in the prosecution years over the amount of reported income. The admission of these computations into evidence was not prejudicial, in the face of the taxpayer's own evidence of failure to disclose income substantially in excess of what the government's proof showed. In Strauch v. United States, supra, we sustained conviction of all three defendants upon ample independent evidence. In United States v. Burdick, supra, it was held that the conviction under review was fully sustainable without resort to the net worth theory and, this being the case, it would constitute a mere academic exercise to reconsider the net worth features in the light of the guidance furnished by the

Supreme Court with respect to net worth prosecutions. It may be that in a case where the issue of tax evasion may be close upon balanced direct evidence, prejudice might be perceived in the introduction of a net worth statement subject to criticism for infirmities therein. This is not that kind of case.

We have examined the instructions of the Court to the jury and find no prejudicial error there. In any event, no timely objections were made to the net worth instructions, principally complained of, required by Rule 30 of Federal Rules of Criminal Procedure. Complaint is also made of misconduct on the part of several jurors brought to the attention of the Court by affidavits, and rejected. This not only runs counter to the rule that jurors may not impeach their verdicts, Nicely v. United States, 129 F. (2d) 357 (C. A. 6), but the affidavits were fully and categorically met by the affidavits of other jurors. The Court knew both the accusing jurors and those accused. He had, undoubtedly, qualified them and had witnessed their conduct in other cases. He had opportunity superior to ours in determining their credibility and passing on their conduct. The Court's denial of a new trial upon this ground is not clearly erroneous. The assailed judgment is

Affirmed.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 459

C. MAXWELL BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PRIOR OPINIONS

The first decision of the Court of Appeals, a *per curiam* order affirming the decision of the District Court, is reported at 209 F. 2d 260. The order of this Court vacating the judgment and remanding the cause to the Court of Appeals for consideration in light of the net worth decisions of this Court[1] is reported at 348 U. S. 905. The opinion

[1] *Holland* v. *United States*, 348 U. S. 121; *Friedberg* v. *United States*, 348 U. S. 142; *Smith* v. *United States*, 348 U. S. 147; *United States* v. *Calderon*, 348 U. S. 160.

of the Court of Appeals reaffirming the judgment of the District Court is reported at 224 F. 2d 845.

JURISDICTION

The judgment of the Court of Appeals was entered on August 12, 1955. (Pet. 35.) On September 1, 1955, by order of Mr. Justice Clark, the time for filing a petition for certiorari was extended to October 11, 1955, on which day the petition was filed. The judisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Government's net worth computations, which actually did little more than corroborate the proof of specific items of unreported income, were properly admitted in evidence.

2. Whether the court's charge to the jury on the nature of the net worth proof and on the element of wilfulness was adequate in the circumstances of this case.

3. Whether certain evidence should have been excluded on the ground that it was obtained by deception and coercion on the part of the revenue agents.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any

person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(26 U.S.C. 1952 ed. 145.)

STATEMENT

Reference is made to the Government's prior brief in opposition in this case (No. 133, October Term, 1954) for a full statement of the facts involved, with record references. In brief, the evidence established by direct proof that the petitioner, an attorney, had received unreported fees in the amounts of $4,059.69 and $5,211.66 in 1946 and 1947. Petitioner admitted receipt of this income, and attempted to explain his failure to report the fees on the theory that the payments were contingent upon his completing the cases involved and did not become taxable income until the cases were actually completed in 1948 and 1949. Many of his clients, however, appeared as witnesses, and only one of these even hinted that fees paid during 1946 and 1947 were for services to be rendered in 1948 or 1949. Thirteen of the remaining seventeen

clients who testified indicated that their fees were paid for services completed by 1947 and were not contingent on future events.[2] Petitioner's own office files contained no evidence that these were contingent contracts. Furthermore, although petitioner himself testified that by the end of 1947 he had received $12,000 in contingent fees subject to clients' claims for repayment, he was unable to explain satisfactorily why the reserve he had on hand only amounted to about $1,500. Almost all of this income was reported in petitioner's 1949 return, which was not filed until after he was aware that an investigation was in progress.

During the investigation petitioner hired a firm of accountants who prepared a net worth statement based upon information supplied by him. No contingent liability was set up for fees which might be returned. When the accountants compared their statement with one prepared by Government agents, the items in both were found to be the same and the results were substantially the same.

ARGUMENT

1. There is no merit in petitioner's attack (Pet. 14-16) upon the Government's net worth proof. As we pointed out in our original brief in opposition (pp. 9-11), and as the opinion below makes clear (Pet. 37-40), the net worth evidence in this

[2] Petitioner's appendix (Pet. 31-32) indicates that twenty-five witnesses gave no testimony as to whether a case was closed out in the same year in which a fee was paid. The classification is misleading since only three of the witnesses in this list had been clients of petitioner.

case merely corroborated the direct proof of specific items of unreported income. Petitioner did not contradict the Government's direct proof and even admitted that he received these unreported sums. He based his defense on the theory that the fees did not constitute taxable income when received, but rather were contingent fees paid for services to be rendered in the future. Consequently, the net worth proof, which simply establishes increased wealth, was not vital here, since it only indicated the receipt of sums which the Government had already proved by direct evidence and which petitioner freely admitted receiving. The Court of Appeals was clearly correct in deciding on the rehearing that the decisions of this Court in the net worth cases required no change in its original affirmance of petitioner's conviction. See *Goldbaum* v. *United States,* 222 F. 2d 360 (C.A. 9th), petition for certiorari dismissed by stipulation, August 9, 1955; *United States* v. *Burdick,* 221 F. 2d 932 (C.A. 3d), certiorari denied, October 10, 1955; *Beaty* v. *United States,* 220 F. 2d 681 (C.A. 4th), certiorari denied, 349 U. S. 946, rehearing denied, October 10, 1955; *Strauch* v. *United States,* 223 F. 2d 377 (C. A. 6th), certiorari denied, October 10, 1955.

2. Petitioner's contentions (Pet. 21-25) with regard to the trial court's instructions on the nature of net worth proof and on the element of wilfulness have already been answered in our prior brief in opposition, and the Court is respectfully referred to that brief at pages 11-13.

Petitioner also urges (Pet. 17-21), for the first time, that the trial court, by permitting the jury to consider the question of the alleged contingent fees only in so far as it bore upon his intent to evade taxes, in effect deprived him of one of his defenses, i.e., that the fees were not taxable income during the prosecution years. But petitioner did not object, at the conclusion of the court's charge, either to the instructions as given or to the court's failure to accept any of his specific requests[3] (R. 228-229). Since the jury was repeatedly told by the trial court that it must find additional taxes owing for 1946 and 1947 in order to convict petitioner (R. 219, 222-223, 224-225), any ambiguity in the passage of which complaint is now made would assuredly have been clarified if called to the court's attention at the conclusion of the charge. Furthermore, petitioner's evasive testimony on cross-examination, in which he admitted that some of the alleged contingent fees had been used to acquire assets (R. 174-177, 206-209), makes it quite clear, as the opinion below points out (Pet. 38), that he treated these fees as money belonging to himself. The question of petitioner's intent to hold these fees in trust for his clients until he had

[3] It is highly doubtful that the requested instruction (No. XVI, R. 52), which petitioner apparently intended to cover the subject of the contingent fees, was proper in the form in which it was submitted. Petitioner admitted that he did not know on what basis he was reporting his income in his return. (R. 165.) Consequently, it could hardly have been correct to tell the jury that there was evidence that he had been reporting his income according to a consistent plan which "clearly reflected his income". (R. 52.)

earned them was so intimately interrelated with the question of his good faith in failing to report them when received, an issue on which the jury was clearly and fully instructed (R. 222, 227), that the jury could not have decided the one without at the same time deciding the other.

3. The issue of petitioner's disclosure of evidence to the revenue agents during the investigation (Pet. 25-30) has been discussed at pages 8-9 of our original brief in opposition. Suffice it to say here that the evidence justified the conclusion that petitioner was not deceived and turned over his records voluntarily.

CONCLUSION

The decision of the Court of Appeals is clearly correct and no conflict of decisions exists. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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